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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-529

FARLEY TERMINAL CO., INC.,
Petitioner,

v.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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October 6, 1975

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FARLEY TERMINAL CO., INC.,
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v.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Farley Terminal Company, Inc., (Farley) petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this case on July 9, 1975.

OPINIONS BELOW

The judgment of the Court of Appeals, entered July 9, 1975, not reported, appears in Appendix A hereto. The opinion of the Court of Appeals, entered July 9, 1975, not yet reported, appears in Appendix B hereto. The Judgement of the United States District Court for the Central District of California, granting The Atchison, Topeka and Santa Fe Motion for Summary Judgement, entered February 19, 1974, not reported, appears

in Appendix C hereto. The District Court Findings of Fact and Conclusions of Law, not reported, appear in Appendix D hereto. Those relevant pages of the Interstate Commerce Commission decision in *Ex Parte 230, Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)*, 322 I.C.C. 301 (1964), dealing with trailer-rental contracts, specifically pages 370-372, appear in Appendix E hereto.

JURISDICTION

The judgement of the Court of Appeals was entered on July 9, 1975 (Appendix A). This petition is filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Prior to the Interstate Commerce Commission (Commission) decision in *Ex Parte 230, Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)*, 322 I.C.C. 301 (1964), The Atchison, Topeka and Santa Fe Railway Company (Santa Fe) leased piggyback trailers to all its shippers pursuant to uniform contracts containing the same rate. Santa Fe had in effect system-wide (system-wide refers only to the Santa Fe system), uniform contracts regarding trailer leasing. In *Ex Parte 230* the Commission, to remove the possibility of future discrimination between shippers, ordered all carriers to publish tariff governing trailer rental. The Commission found the record "almost completely devoid of evidence" that any discrimination between shippers had existed under the uniform system-wide contract rates. (322 ICC p. 371, Appendix E, p. 3e) Santa Fe did not publish a tariff providing for the prior contract rates and charges. Instead, as a member of the Transcontinental Freight Bureau, it joined with other railroads in publishing higher conference rates.

Petitioner filed suit against Santa Fe for breach of contract to recover the difference between the contract rate and the published tariff rate. Petitioner, in support of its Motion for Summary Judgement, alleged, *inter alia*, that Section 5a(6) of the Interstate Commerce Act (49 USC § 5b(6)) guaranteed Santa Fe the free and unrestrained right of independent action within any rate conference, and that Santa Fe was under a duty to exercise that right and to publish a tariff containing the contract rates. The District Court granted Summary Judgement to Santa Fe and the Court of Appeals affirmed. The questions presented are:

1. Whether a tariff which is merely filed with the Interstate Commerce Commission is a commission approved rate which bars a shipper from asserting that the tariff rate exceeds prior uniform contract rates.
2. Whether a carrier can unilaterally void uniform system-wide contract rates by mere publication of a tariff with a higher rate.
3. Whether *Ex Parte 230*, which the District Court found did not express an intent to negative existing rate contracts, nevertheless voided existing rate contracts.
4. Whether a carrier can avoid its contractual obligations by refusing to exercise the free and unrestrained right to take independent action in accordance with Section 5a(6) of the Interstate Commerce Act and publish its own tariff containing existing contract rates.

STATUTES INVOLVED

Title 49 United States Code, Section 5b(6) and § 41 are set forth in Appendix F hereto.

REGULATIONS INVOLVED

Title 49 C.F.R. Section 1090.7(a), formerly 49 C.F.R. Section 500.7, is set forth in Appendix G hereto.

STATEMENT OF CASE

Petitioner, Farley, is a shippers' agent conducting itself under the regulatory exclusion found in Section 402(c)(2), Interstate Commerce Act (49 U.S.C. § 1002 (c)(2)). Farley consolidates two piggyback trailers (trailers transported on railroad flatcars), each trailer belonging to a separate shipper, into a single shipment with one bill of lading. This consolidated shipment permits the piggyback trailers to be transported under a lower tariff rate than that which would be charged each individual shipper for a single trailer. In the performance of its services as a shippers' agent, Farley ships, as rail consignor, numerous piggy-back trailers over the lines of Santa Fe. Santa Fe is a common carrier by railroad subject to the provisions of the Interstate Commerce Act. (49 U.S.C. § 1, *et seq.*)

This case involves the leasing of trailers by Farley for use in piggyback or trailer on flatcar (TOFC) service. Prior to *Ex Parte 230* Santa Fe merely provided a transportation service under applicable tariff provisions. Farely was required to furnish its own trailers and its own railroad flatcar. Since Santa Fe owned numerous trailers and flatcars, Farley leased trailers and flatcars from Santa Fe. In accord with the custom and practice within the industry the leasing by Farley was governed by a contract. Although one railroad might charge a different rate than that charged by another railroad, Santa Fe charged all of its shippers the same rate.

In 1962, the Interstate Commerce Commission instituted a general investigation into trailer-on-flatcar

(TOFC) or piggyback service. The Commission issued its final report in 1964, *Ex Parte 230, Substituted Service—Charges and Practices Of For-Hire Carriers And Freight Forwarders (Piggyback Service)*, 322 ICC 301 (1964).[1] One of the issues considered in *Ex Parte 230* involved consideration of whether trailer leasing charges should be required to be included in tariffs in the future. The Commission did not find that the generally accepted practice of contracting for trailer rental had resulted in any prior violations of the Elkins Act. In order to eliminate any opportunity for future abuse, however, the Commission required Santa Fe and other rail carriers to publish their trailer leasing charges in tariffs in accordance with Rule 500.7 of *Ex Parte 230*, (322 ICC at 415, *et seq.*, now 49 C.F.R. § 1090.7(a)).

In *Ex Parte 230* the Commission nowhere stated that it had intended to negative or render null and void outstanding contracts, and did not prescribe the level of rates to be contained in the tariffs required to be filed.

Santa Fe, as a member of the Transcontinental Freight Bureau (Freight Bureau), joined with other railroads in publishing tariffs governing rental to shippers of piggyback trailers. Such tariffs did not contain the rates established in existing contracts; instead, the tariff contained substantially higher rates.

On August 3, 1975, Farley filed its complaint for breach of contract in United States District Court for the Central District of California. Santa Fe, in its Answer, did not plead as an affirmative defense that it was required to file higher rates because the existing contract rates were non-compensatory and thus unjust

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[1] *Ex Parte 230* was challenged on other grounds and reversed in *A.T. & S.F. Ry.* v. *United States*, 244 F. Supp. 955 (N.D. Ill. 1965). This decision, in turn, was reversed and Ex Parte 230 was affirmed in *American Trucking Association* v. *A.T. & S.F. Ry. Co.*, 387 U.S. 847 (1967).

and unreasonable. Rather it contended that, as a matter of law, *Ex Parte 230* nullified all pre-existing contracts. That court granted a Santa Fe motion for summary judgement, dismissed the Farley complaint, and entered judgement for Santa Fe. The district court specifically found (Appendix D, p. 2d):

> That the rates provided in said tariff, as a matter of law, rendered null and void the rates contained in the Lease Agreement . . .; although *Ex Parte 230* did not express an intent to negative existing rate contracts.

Farley appealed to the Court of Appeals for the Ninth Circuit which affirmed the district court in *Farley Terminal Co., Inc.* v. *The Atchison, Topeka and Santa Fe Railway Company*, No. 74-1872, July 9, 1975.

The main thrust of the Court of Appeals decision centered around its finding that a contract, although valid when made, is nevertheless rendered void by a subsequently published tariff. This holding was premised upon findings that the published rate was a Commission approved rate, and that a tariff has the effect of a statute for all purposes. Thus, the Court of Appeals reasoned that if a statute can void prior inconsistent contracts, it follows that a carrier-published tariff can likewise void prior inconsistent contracts. The court did not even mention the failure by Santa Fe to exercise its free and unrestrained right, guaranteed to it by Section 5a(6) of the Interstate Commerce Act, to take independent action and publish a tariff providing the same uniform system rates and charges contained in existing contracts.

REASONS FOR GRANTING THE WRIT

Questions presented are of major importance and nationwide applicability in the administration of the

numerous Acts regulating commerce, particularly the Interstate Commerce Act. The issues relate to basic principles regarding carrier-made and Commission-made rates and to the implementation of Section 5a(6) of the Interstate Commerce Act regarding the right and duty of each member of a Rate Bureau to file its own tariff applicable to its own transportation services.

1. The holding below rests upon principles of law in conflict with *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. 370 (1932); and *Middlewest Motor Freight Bureau* v. *United States*, 433 F.2d 212 (8th Cir. 1970), *cert. denied* 402 U.S. 999 (1971).
2. Whether a tariff published pursuant to an *Ex Parte 230* type order will, by the mere fact of publication, void prior uniform system-wide contract rate provisions, presents an issue affecting basic principles of rate regulation which should be decided by this Court.
3. Whether Section 5a(6) of the Interstate Commerce Act imposes a duty upon, as well as provides the right to, each member of a Rate Bureau to publish its own tariff establishing uniform rates, applicable to its own system and consistent with contract obligations, is a question affecting proper regulation and proper conference rate-making which should be decided by this Court.

1. The Decision Below Conflicts With Decisions Of This Court That A Carrier-Made Rate Is Not An Approved Lawful Rate.

The decision of the court below is in conflict with principles of law established by this Court in *Arizona Grocery Co.* v. *Atchison, Topeka & Sante Fe Ry. Co.*, 284 U.S. 370 (1932). This Court in *Arizona Grocery* clearly enunciated the differing legal effects of

carrier-made and Commission-made rates. The court below has failed to apply principles of law applicable to a carrier-made *legal* rate and, instead, has viewed the issues as relating to a Commission-made *lawful* rate.

The court below has premised its ultimate holding upon a preliminary determination that the tariff in issue was an "approved" tariff. The statement of the issue before it assumes a tariff "when approved". (Appendix B, p. 2b). The statement of fact recites that:

> "(T)he railroads, including the Santa Fe, filed [a] Trans-Continental Freight Bureau Freight Tariff .... This tariff, which established higher rates for the leasing of TOFC equipment than were provided in the pre-existing leases, became effective November 17, 1967, *after ICC approved it.* (Emphasis added) (Appendix B, p. 3b).

The tariff in this case was filed in purported compliance with *Ex Parte 230*. The rates were carrier-made rates, not "approved" Commission-made rates.

In *Arizona Grocery, supra*, at p. 352, this Court stated:

> "In order to render rates definite and certain, and to prevent discrimination and other abuses, the statute required the filing and publishing of tariffs specifying the rates adopted by the carrier, and made these the *legal rates*, that is, those which must be charged to *all* shippers alike. . . . Although the Act thus created a legal rate, it did not abrogate but expressly affirmed, the common-law duty to charge no more than a reasonable rate, and left upon the carrier the burden of conforming its charges to that standard. *In other words, the legal rate was not made by statute a lawful rate,*—it was lawful only if it was reasonable. Under § 6 the shipper was bound to pay the legal rate, but if he could show that it was unreasonable he might recover reparation. (Emphasis added).

Recognition that once a tariff is unilaterally published and becomes effective, the rate provided therein is the only rate which a carrier can lawfully charge shippers on its system, does not require the conclusion, asserted by the court below, that such a carrier-made tariff rate cannot be attacked by a shipper as either unlawful or as a unilateral rate publication made in excess of the uniform system contract rate.

The resulting legal consequences of applying principles of law properly related to carrier-made rates rather than Commission-made rates should be reviewed and resolved by this Court.

2. The Holding Below Conflicts With The Decision Of Another Court Of Appeals.

The holding below rests upon principles of law in conflict with the decision of the Court of Appeals for the 8th Circuit in *Middlewest Motor Freight Bureau* v. *United States*, 433 F.2d 212 (8th Cir. 1970), cert. denied 402 U.S. 999 (1971).

In *Middlewest Motor Freight Bureau* v. *United States, supra*, the court, recognizing the principles in *Arizona Grocery* regarding carrier-made rates, stated (p. 238):

> "But merely because the carrier is bound to charge the filed rate, it does not follow that he is necessarily entitled to keep it."

Thus, Santa Fe is not entitled to keep that amount of money charged in its tariff which exceeds the contract rate.

The published tariff rate was the *legal* rate which Santa Fe was obligated to charge all shippers alike, including Farley. But, if Farley could show that such legal rate was in excess of the contract rate and, therefore, Santa Fe had breached its contract, Farley was entitled to recover damages for breach of contract. The

court below, however, failed to recognize the fundamental principle that a *legal* rate can be attacked by a shipper in a proceeding before a federal district court for breach of contract.

3. A Carrier Cannot Unilaterally Circumvent A System-Wide Contract Rate By Mere Publication Of A Tariff With A Higher Rate.

The court below ruled, for the first time, that a valid system-wide contract rate is rendered void by mere publication of tariff rates. This holding is a direct consequence of the failure of the court to comprehend the fundamental principle that a legal rate can be attacked by a shipper as being unreasonable or, as in the instant case, as in excess of the contract rate. Petitioner does not dispute that a published tariff rate is the legal rate and is binding on carrier and shipper alike. However, a shipper is not precluded from asserting that the rate constitutes a breach of the contract rate.

The court below assumed that since a legal rate has the force of statute it, like a statute, will nullify prior, inconsistent contract rates. The only case cited by the Court of Appeals in support of its novel theory. *Louisville & Nashville Railroad Company* v. *Mottley*, 219 U.S. 467, 477-486 (1911), dealt with a valid contract which was voided by the subsequent passage of the Interstate Commerce Act.

Mottley is clearly inapposite. The Louisville and Nashville contracted with Mr. and Mrs. Mottley in 1871 to provide free transportation passes in return for their release of the railroad from all damages for injuries received in a train collision. After enactment of the Interstate Commerce Act in 1906, Section 1 of which prohibited the issuance of free passes, the railroad refused to honor its contract, and this Court upheld its

position. The instant case rests upon entirely different facts. *Mottley* did not deal with tariff rates, which are by their very nature creatures of carriers and not of Congress. *Mottley* dealt with legislative action which voided prior contracts. Thus, *Mottley* is applicable only if tariff rates are considered statutes *for all purposes*. This, however, is not the law. A published tariff rate has the force and effect of statute only insofar as it is the legal rate which must be charged all shippers. Thus, shippers are not precluded from attacking the carrier-made tariff rate as unreasonable or in excess of the contract rate.

Armour Packing Company v. *United States*, 209 U.S. 56, 81-83 (1908) is also inapposite. In *Armour* the carrier had pre-existing tariff rates in effect at the time it entered into a transportation contract with a single shipper, Armour. This Court merely held that when the tariff rate was later increased it was the legal rate which was required to be charged each shipper, including Armour, and that the carrier and shipper were subject to criminal sanctions if the *legal* published rate was not charged and paid. This is not the situation in the instant case. Armour involved a criminal action for failure to apply the published rate. It was in no respect a civil action for breach of contract. This Court, therefore, did not address the question of whether a carrier could nullify a contract by merely publishing a tariff. The only question in *Armour* was: Once a tariff is published, may less than the legal, published rate be charged?

In *Armour* the contract was between the carrier and a single shipper. Here, the contract rate was a uniform rate for the entire Santa Fe system. All shippers who shipped within the Santa Fe system did so at the same contract rate. While enforcement of the lower contract rate would have permitted the single shipper in *Armour* to ship

his goods at a lower rate than other shippers, such is not the case here. Since the contract rate was a uniform rate throughout the entire Santa Fe system, all shippers are entitled to the lower contract rates.[2] Also, in *Armour*, the shipper contracted with the carrier at a rate equal to the then existing tariff rate. While the shipper in *Armour* could be said to have contracted subject to any increase in the tariff rate, the same principle is not applicable to the instant case where there was no existing tariff rate. This is especially true since in the instant case the contract rate was a system-wide rate.

Armour and *Mottley* are clear examples of specific Congressional action which proscribe effectiveness of contractual undertaking.

The Interstate Commerce Commission has consistently observed that a contract rate, especially where, as here, the contract rate is uniform and system-wide, can only be nullified where the contract rate is an unlawful rate, that is, an unjust and unreasonable rate, as for example being non-compensatory. Beginning with *Rates on Crushed Stone From McCook and Thornton, Ill., To Stations In Indiana and Michigan*, 29 I.C.C. 136 (1914), the Commission has held that the fact that contracts have been entered into will not preclude carriers from increasing their rates if an increase is required to receive a fair return. In *Chattanooga Log Rates*, 30 I.C.C. 36 (1914), the Commission again adopted this position, holding:

> . . . shippers have no interest in a rate by reason of contract . . . such that this fact standing alone would preclude the raising of a rate *if* same *were found unreasonably low.* (30 I.C.C. 39) (Emphasis added)

[2] The Elkins Act, Interstate Commerce Act, Sections 49 U.S.C. §§ 41-43, required that those shippers who did not have a contract with the Santa Fe also be entitled to the benefits of the lower contract rates.

Recently, the Commission confirmed that only if a contract rate is unjust or unreasonable can the carrier publish higher rates:

> Moreover, the provision in the contract that no increase could be made in the contract rates during the effectiveness of the contract unless otherwise ordered by the Commission even though changed conditions might warrant such an increase, appears to be inconsistent with the continuing obligation of common carriers to establish and maintain just, reasonable and otherwise lawful rates. *Contract Rates, Rugs and Carpeting From Amsterdam, N.Y., To Chicago*, 313 I.C.C. 247, 252 (1961).

The Commission has also consistently held that the burden of proof regarding any change in rates is upon the carrier. *Classification of Plumbers' Goods in the South*, 214 I.C.C. 305, 308 (1936), *Elimination of Baggage Service on Penn Central*, 335 I.C.C. 215, 221 (1969). In *Interchange Switching at Wichita, Kansas*, 61 I.C.C. 205 (1921), the Commission held:

> In connection with proposed increases in rates or charges carriers should be prepared to sustain the burden of justification which the law has placed upon them. (61 I.C.C. at 207).

Thus, in the instant proceeding, after Farley filed its complaint for breach of contract, the burden was upon Santa Fe to plead and prove, by way of affirmative defense, that the contract rate was unjust and unreasonable. This it did not do. The district court had jurisdiction to decide the breach of contract issue.

Since Santa Fe failed to plead such affirmative defense, the only issue to be decided was whether the uniform system-wide contracts were breached. Summary judgement was erroneously entered against Farley.

The court stated, in footnote 4 of its opinion, (Appendix B, pp. 6b-7b) that Farley had presented no showing that the *published* rate was unreasonable. The court misconstrued the law. As previously demonstrated, Santa Fe did not raise the issue of whether the contract rates were unjust and unreasonable. The issue was not before the court. But even if the issue had been raised, the burden of proof was upon Santa Fe to prove that the *contract* rate was unjust and unreasonable, not that the *published* rate was just and unreasonable.

Petitioner does *not* contend that the Santa Fe, once it published a tariff containing higher rates than those in the contract, could still charge the contract rate. Petitioner does contend that a shipper is not precluded from attacking a published tariff rate as being in excess of a prior uniform system-wide contract rate. *Ex Parte 230* required Santa Fe to publish a tariff governing the leasing of trailers. It did not require that a rate higher than the existing contract rate be published. Petitioner contends that the uniform, system-wide contracts required Santa Fe to publish its tariff at the contract rate.

The Commission specifically found shipper contracts, in effect at the time of *Ex Parte 230*, to be the prevalent practice in trailer leasing by railroads and that there was no evidence of unfair practices. The Commission sought only to prevent possible future unfair practices, and did not declare, either expressly or by implication, such agreements to be null and void. *Ex Parte 230* did not, expressly or by implication, authorize a unilateral breach of contract leasing rates through publication of higher tariff rates and charges.

The district court, affirmed by the Court of Appeals, held that *Ex Parte 230*, as a matter of law, voided the uniform system-wide contracts. The district court also

held that *Ex Parte 230* "did not express an intent to negative existing rate contracts." These two findings are legally inconsistent. *Ex Parte 230* required carriers to publish tariffs to eliminate any potential future abuse. It did not find that any rate discrimination had taken place. Since no rate discrimination between shippers had taken place there was no need to void the then existing contract rates. Thus, publication of tariff rates identical to the contract rates was required to comply with the letter and spirit of the regulations promulgated pursuant to *Ex Parte 230*. In short, there was absolutely no reason to nullify the existing contract rates. *Ex Parte 230* required only that the then existing contracts be published in tariff form.

The Court of Appeals for the 6th and 8th Circuits have held that a contract will not be nullified by subsequent legislation unless the legislature evidences an intention to negative the contract. See *Et-Hokin & Galvan, Inc.* v. *Maas Transport, Inc.*, 380 F.2d 258 (8th Cir. 1967), cert. denied, 389 U.S. 977 (1967); *McCullough Transfer Co.* v. *Virginia Surety Co.*, 213 F.2d 440 (6th Cir. 1954). As the district court properly held, Ex Parte 230 evidences no such intent. See also: *Keller* v. *Thorton Canning Company*, 59 Cal. Rptr. 836, 429 P. 2d (1967).

Whether a carrier may nullify a uniform system-wide contract rate by mere publication of a tariff containing a higher rate has never before been decided by this Court. The issue is one of general importance to proper rate regulation and merits review by this Court, particularly since compliance with the order directing a tariff filing did not disapprove existing contracts and practices pursuant thereto.

4. Santa Fe Had A Duty To Publish Its Own Tariff Containing Rates Consistent With Existing Contracts.

Santa Fe did not publish a tariff which contained the same rates and charges provided for in its uniform system-wide contracts. Instead, Transcontinental Freight Bureau Tariff 2-F Supplement 41, Section 1, Item 4900-E, filed on behalf of numerous railroads, including Santa Fe, established higher rates for the leasing service than were provided in the Santa Fe-Shipper Contracts.

As shown above, *Ex Parte 230* did not void existing contract rates but required only that Santa Fe publish a tariff providing all terms and conditions and rates and charges for its TOFC service. Santa Fe, by exercising the free and unrestrained right to take independent action guaranteed to it by Section 5a(6) of the Interstate Commerce Act (49 U.S. § 5b(6)) should have published its own tariff reflecting the uniform system-wide contract rates and charges.

Section 5a of the Interstate Commerce Act was enacted by Congress in 1948 in response to the decision of this court in *State of Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 439 (1945) rehearing denied 324 U.S. 890 (1945) to permit agreements between two or more carriers relating to rates, which agreements if approved by the Commission would relieve the parties from the operation of the anti-trust laws. Section 5a(6) specifically provides:

> "The Commission shall not approve under this section any agreement which establishes a procedure for the determination of any matter through joint consideration unless it finds that under the agreement there is accorded to each party the free and unrestrained right to take independent action either before or after any determination arrived at through such procedure."

Where, as here, Santa Fe could have, by exercise of the right guaranteed by Section 5a(6), published its tariff and provided for the uniform system-wide contract rate and complied fully with *Ex Parte 230*, there is a duty upon Santa Fe to exercise that right. In failing to do so, and in joining with other members of the Freight Bureau and publishing a higher tariff rate, Santa Fe not only committed a breach of the Santa Fe-Farley contract, but also, Petitioner submits, acted contrary to the intention of Congress when it provided for the exemption from the anti-trust laws. If other railroads had differing system-wide rates prior to *Ex Parte 230*, the end result of the failure of Santa Fe to publish its own tariff consistent with its contracts was to have only one rate instead of several competitive rates.

In view of the failure of Santa Fe to publish its own tariff, this Court should grant review to determine the effect of such action as the same relates to the § 5a exemption from the anti-trust laws.

CONCLUSION

For the above reasons, the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

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October 6, 1975

APPENDIX

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 74-1872

DC #73-1818

FARLEY TERMINAL COMPANY, INC.,
Plaintiff-Appellant,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Defendant-Appellee

No. 74-2410

DC #73-1806

HAROLD WILLINGER AS ASSEMBLY CON.,
Plaintiff-Appellant,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Defendant-Appellee.

APPEAL from the United States District Court for the Central District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment

of the said District Court in this Cause be, and hereby is AFFIRMED.

74-1872

With costs in this court in favor of the Appellee and against the Appellant in the amount of	$326.84
Cost of printing Appellee's brief	$326.84

Filed and entered July 9, 1975

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 74-1872

FARLEY TERMINAL COMPANY, INC.,
Plaintiff-Appellant,
vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY,
Defendant-Appellee.

No. 74-2410

HAROLD WILLINGER, doing business as
ASSEMBLY CONSOLIDATORS,
Plaintiff-Appellant,
vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY,
Defendant-Appellee.

OPINION

[July 9, 1975]

Appeal from the United States District Court
for the Central District of California

Before: KOELSCH and GOODWIN, Circuit Judges, and WOLLENBERG,* District Judge.

PER CURIAM:

In these separate but related actions for damages for breach of contract, Farley Terminal Co., Inc., and Harold Willinger, lessees of TOFC (trailer-on-flatcar) or "piggyback" service equipment under separate but substantially identical lease agreements with the Atchison, Topeka and Santa Fe Railway Company (the Santa Fe), appeal from the district court's granting of summary judgments in favor of the lessor railway. The question presented is whether the Santa Fe's filing of a rate tariff as required by the Interstate Commerce Commission (ICC)—which tariff, when approved, imposed on lessees higher rates for the leasing of TOFC equipment than were provided in the pre-existing lease agreements—constitutes an actionable breach of those agreements. We conclude it does not and therefore affirm.

Briefly, the facts are these: In its decision in *Ex parte 230, Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)*, 322 I.C.C. 301 (1964), the ICC promulgated regulations requiring that each railroad providing TOFC service in interstate commerce publish, post, and file tariffs containing all rates and charges for the leasing of its TOFC equipment. *See* 322 I.C.C. at 415; 49 C.F.R. § 500.7 (1964), redesignated 49 C.F.R. § 1090.7 (1967).[1]

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* The Honorable Albert C. Wollenberg, United States District Judge for the Northern District of California, sitting by designation.

[1] A challenge to *Ex parte 230*, on grounds not relevant to this appeal, was sustained in *A., T. & S. F. R. Co.* v. *United States*, 244 F. Supp. 955 (N.D. Ill. 1965) (three-judge court), and then *reversed sub nom. American Trucking Associations, Inc.* v. *A., T. & S. F. R. Co.*, 387 U.S. 397 (1967)

Early in 1967, Farley and Willinger executed separate lease agreements with the Santa Fe whereby each agreed to lease trailers and flatcars from the railway on an availability basis, at rates specified in the agreements. During the following months, each was charged at those rates. However, in July, 1967, the ICC served an order on the Santa Fe and other railroads which provided TOFC service, requiring them to comply with the regulations promulgated in *Ex parte 230* by filing appropriate tariffs before August 18, 1967. After obtaining a ninety-day extension, the railroads, including the Santa Fe, filed Trans-Continental Freight Bureau Freight Tariff 2-F, Supplement 41, Section 1, Item 4900-E. This tariff, which established higher rates for the leasing of TOFC equipment than were provided in the pre-existing leases, became effective November 17, 1967, after the ICC approved it. Lessees were thereafter charged at the new, higher rates. They brought these actions to recover the difference between the charges they paid under the tariff and those they would have paid under their respective agreements. The district court granted summary judgments in favor of the Santa Fe, and these appeals followed.

We commence with the fundamental principle that summary judgment is proper only where there is no genuine issue as to any material fact or where, viewing the evidence and the inferences which may be drawn therefrom in the light most favorable to the adverse party, the movant is entitled to prevail as a matter of law. Rule 56, F. R. Civ. P. Here the district court properly granted summary judgments in favor of the railroad.

Appellants concede, as they must, that once the new tariff rates for TOFC service became effective, the Santa Fe was bound by law to charge those rates. Section 6(7) of the Interstate Commerce Act, 49 U.S.C. § 6(7), prohibits carriers in interstate commerce from receiving

"different compensation . . . than the rates, fares, and charges which are specified in the tariff filed and in effect at the time." Moreover, the Elkins Act, 49 U.S.C. §§ 41 *et seq.*, provides criminal penalties for departures from the published rates, *see* 49 U.S.C. § 41(2), and for a carrier's returning to a shipper rebates or offsets against them, *see* 49 U.S.C. § 41(3).

Appellants nevertheless urge their entitlement to damages based on the variance between the tariff rates they were charged and those specified in their pre-existing agreements with the railway. We are not persuaded. It is well recognized that the principal congressional purpose in enacting the Interstate Commerce Act was to obtain a uniformity of rates and an end to discriminatory practices. As the Court early noted in *New Haven Railroad Company* v. *I.C.C.*, 200 U.S. 361, 391 (1906):

> "It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve."

Where, as here, a conflict exists between published tariff rates and rates enumerated in pre-existing agreements, we think it well established that the tariff rates must prevail. Were we to permit enforcement of the inconsistent contractual rates, we would significantly undercut the clear policy of the Act to secure equal rates for all, as well as condone one discriminatory situation

such as the Act was intended to remedy. *See, e.g., Louisville and Nashville Railroad Company* v. *Mottley*, 219 U.S. 467, 477-486 (1911); *Armour Packing Company* v. *United States*, 209 U.S. 56, 81-83 (1908); *Texas and Pacific Railway Company* v. *Mugg*, 202 U.S. 242, 245 (1906); *New Haven Railroad Company, supra*, 200 U.S. at 390-393.[2] *Cf. American Trucking Association, Inc.* v. *A., T. & S. F. R. Co.*, 387 U.S. 397, 406 (1967).

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[2] For example, the Court observed in *Armour Packing Company, supra*, 209 U.S. at 81-82, as follows:

> "It [the law regulating interstate commerce] has provided for the establishing of one rate, to be filed as provided, subject to change as provided, and that rate to be while in force the only legal rate. Any other construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish.
>
> ". . . This feature of the law, it is insisted, puts the shipper in many kinds of trade at the mercy of the carrier, who may arbitrarily change a rate, upon the faith of which contracts have been entered into. But the right to make such regulations is inherent in the power of Congress to legislate respecting commerce, and such consideration of inconvenience or hardship address themselves to the law-making branch of the Government. . . .
>
> "The statute being within the constitutional power of Congress, and being in force when the contract was made, is read into the contract and becomes a part of it.
>
> "If the shipper sees fit to make a contract covering a definite period for a rate in force at the time he must be taken to have done so subject to the possible change of the published rate in the manner fixed by statute, to which he must conform or suffer the penalty fixed by law."

The Court further said in *Mottley, supra*, 219 U.S. at 482-483:

> "The agreement between the railroad company and the [plaintiffs] must necessarily be regarded as having been made subject to the posibility that, at some future time, Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable or impair its value. That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations, is inconceivable.

In this connection, a tariff, rate, or charge, duly established in accordance with the Act, is the legal rate; it has the force of statute and is binding on carrier and shipper alike. *See Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939); *Pennsylvania Railroad Company* v. *International Coal Mining Company*, 230 U.S. 184, 196-197 (1913); *Robinson* v. *Baltimore and Ohio Railroad Company*, 222 U.S. 506, 508-510 (1912).[3] And a contract valid when made is nevertheless rendered void by subsequently established tariff rates which are inconsistent, at least to the extent of the inconsistency. *See Mottley*, *supra*, 219 U.S. at 480-486.[4] Moreover, a

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The framers of the Constitution never intended any such state of things to exist.

". . . After the commerce act came into effect no contract that was inconsistent with the regulations established by the act of Congress could be enforced in any court. The rule upon this subject is thoroughly established."

[3] Appellants rely heavily on *Macco Construction Company* v. *Farr*, 137 F.2d 52 (9th Cir. 1943), and *Ets-Hokin & Galvan, Inc.* v. *Maas Transport, Inc.*, 380 F.2d 258 (8th Cir. 1967), *cert. denied*, 389 U.S. 977 (1967). We think both decisions are inapposite. In *Macco*, we held that a contract which incidentally violated a California licensing statute was not thereby rendered unenforceable because the California legislature did not intend that such violations void otherwise legal contracts. 137 F.2d at 55. And in *Ets-Hokin*, which relied in part on *Macco*, the Eighth Circuit held that a contract which violated the Motor Carrier provisions of the Interstate Commerce Act was not unenforceable because Congress, in passing those provisions, did not intend "that contracts resulting in violations of that portion of the Act be illegal and void." 380 F.2d at 260-261. Here, however, as noted in the cited cases, Congress did intend to render void rates inconsistent with those established in conformity with the Act.

[4] Appellants cite *Chicago, Milwaukee, St. Paul & Pacific Railroad Company* v. *Alouette Peat Products*, 253 F.2d 449 (9th Cir. 1957), for the proposition that, even though shippers are required to pay carriers the rate on file with the ICC, a showing that such a rate was not lawfully established would entitle them to recover the difference between what they had thus paid and the lawfully established rate. Here, however, appellants have presented no showing that the published rate was unreasonable or otherwise established

shipper's knowledge of duly published tariff provisions is presumed. *American Railway Express Company* v. *Daniel*, 269 U.S. 40, 42 (1925); *Kansas City Southern Railway Company* v. *Carl*, 227 U.S. 639, 653 (1913); *Chicago & Alton Railroad Company* v. *Kirby*, 225 U.S. 155, 166 (1912); *Mugg*, *supra*, 202 U.S. at 245.[5]

Appellants' remaining contention—that the Santa Fe was required under the circumstances to establish a tariff rate identical to that enumerated in its pre-existing agreements with appellants—is without merit. It is well settled that a carrier is entitled to initiate rates, and to adopt such policy of rate-making as it deems wise, subject to the revisory powers conferred upon the ICC. *See Diamond Tank Transport* v. *United States*, 23 F. Supp. 497, 501 (W.D. Wash., N.D. 1938) (three-judge court), *affirmed*, 305 U.S. 567 (1938); *United States* v. *Illinois Central Railroad Company*, 263 U.S. 515, 522 (1924). And in light of the congressional intention, already noted, that pre-existing agreements be abrogated by subsequently promulgated regulations, at least to the extent of the inconsistency, we think it clear that a carrier's decision fixing a proposed tariff rate to be charged uniformly to all should not be foreclosed by its pre-existing obligation to charge a different rate to a few.

AFFIRMED.

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in violation of the Act. The mere fact that the published rate is inconsistent with a rate enumerated in pre-existing contracts does not render it violative of the Act.

[5] *Southern Pacific Company* v. *Miller Abattoir Company*, 454 F.2d 357 (3d Cir. 1972), relied on by appellants, is not to the contrary. That decision merely held that a provision in a shipping contract, requiring that the railroad immediately notify the consignee if a cargo of livestock were stopped in transit by quarantine, was not satisfied by the railroad's publication of a tariff explicitly stating that screw worms existed in Arizona and that livestock leaving that state would be stopped for inspection. *See* 454 F.2d at 361-362.

APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Civil Action No. 73-1818-EC

FARLEY TERMINAL CO., INC.,
Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY,
Defendant.

JUDGMENT

This action came on for hearing before the Court, Avery E. Crary, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED, that the plaintiff take nothing and that the action be dismissed on the merits.

DATED at Los Angeles, California, this 19th day of February, 1974.

/s/ E. Avery Crary
United States District Judge

APPENDIX

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vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY,
Defendant.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court, having duly heard defendant's Motion for Summary Judgment on February 11, 1974, does hereby make the following findings of facts and conclusions of law:

That on February 20, 1967, plaintiff and defendant executed a Lease Agreement, wherein defendant would lease to plaintiff, on an availability basis, TOFC equipment (flat cars and trailers) at rates specified in the terms of the aforementioned Lease Agreement;

That prior to November 17, 1967, defendant charged plaintiff for lease and use of such equipment pursuant to the aforementioned Lease Agreement;

That subsequent to November 17, 1967, Trans-Continental Freight Bureau Tariff Supplement 41 to Freight Tariff 2F, Item 4900, Section I, was approved by the Interstate Commerce Commission and filed and became effective;

That the aforementioned tariff had the force and effect of law and was the proper tariff for defendant to charge plaintiff for plaintiff's use of defendant's TOFC equipment in Interstate Commerce;

That the rates provided in said tariff, as a matter of law, rendered null and void the rates contained in the Lease Agreement, dated February 20, 1967; [although Ex Parte 230 did not express an intent to negative existing rate contracts]

That, therefore, as a matter of law, the proper rates for defendant to charge plaintiff for its use of defendant's TOFC equipment for eastbound movements in Interstate Commerce, were the rates contained in the aforedescribed tariff.

It is ordered, therefore, that defendant's Motion for Summary Judgment be and the same hereby is granted and that said Judgment be entered herein in the defendant's favor, dismissing this action with costs to be taxed by the Clerk in favor of the defendant and against the plaintiff.

DATED: Feb. 19, 1974

/s/ E. Avery Crary
United States District Judge

APPENDIX

EX PARTE NO. 230

SUBSTITUTED SERVICE—CHARGES AND PRACTICES OF FOR-HIRE CARRIERS AND FREIGHT FORWARDERS

(PIGGYBACK SERVICE)

Decided March 16, 1964

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* * * *

It is apparent that this state of affairs places a preminum on a shipper's having a sophisticated traffic department, capable of assessing the various available services, charges, and allowances, and of determining what combination offers the best transportation bargain in moving a particular shipment. We think that carriers should be encouraged to use as simple a method of tariff publication as possible, and should be discouraged from permitting the kind of situation illustrated. It is also clear that the general practice by which railroads and their affiliates trip lease trailers to shippers for immediate use in TOFC service contains potential seeds of discrimination. Unless the same opportunity to lease equipment is made available to all similarly situated shippers at the same price, the leasing of a trailer to a favored shipper can become a concession violative of the Elkins Act.

While we recognize that there are opportunities for discrimination in present rate publication and equipment leasing practices, we cannot agree with the A.T.A. that the only available cures are a straitjacket for TOFC tariffs and major surgery to excise trailer leasing. The

contentions that rail carriers are required by statute to publish rates only for a "complete" service and that they are obligated to furnish trailers whenever TOFC service is provided were disposed of in *Eastern Central M. Carriers Assn.* v. *Baltimore & O. R. Co.*, 314 I.C.C. 5, 45-47, *aff'd. sub nom. Cooper-Jarett, Inc.* v. *United States*, F.Supp. (W. D. Mo. 1964) (civil action No. 13469, February 6, 1964). The basic flaw in the A.T.A.'s legal argument, which was also pointed out in that decision, appears to be the false assumption that a highway trailer necessarily is an "instrumentality of transportation" which carriers must furnish. This can, of course, be the case when a railroad holds out a service which by its nature requires performance of some motor carriage. But it need not hold out to perform more than rail service, and in that case the trailer, tendered for transportation by a shipper, is nothing more than a container—an "article of commerce."

We must point out here that we are not holding that the service which a carrier holds out to perform can only be ascertained from the actual words of its tariff. When a rail carrier offers a ramp-to-ramp TOFC service, ostensibly confined to the line-haul rail transportation of loaded highway trailers tendered at its terminal by shippers, but then proceeds to lease trailers, and to provide drayage, loading, and other "accessorial" services, we think that it is *in fact* holding out a complete door-to-door service. In such a case, all the services it provides become *transportation* services rather than mere accessorial services, and they are required to be the subject of its tariff publications. This, we think, disposes of the New York Central's argument that we have no authority to require the publication of accessorial services. To agree with the Central's position would be to allow any carrier, by self-imposed limitations contained in its tariffs, to designate what

it considers to be transportation services and what it considers nontransportation services. This distinction is, we believe, a matter of fact and not one that can be imposed by fiat. The nature of piggyback—the fact that its advantage lies in its being a combination of rail and motor transportation—makes rail carriers tend to offer to their customers services which were traditionally provided only by motor carriers and which can physically be performed only with motor vehicles. Such services, we believe, will normally be transportation services when offered in connection with TOFC transportation.

The existence of opportunities to engage in discriminatory practices, standing alone, will not, in our opinion, justify our requiring a strict format for TOFC rate publications or striking down the prevalent practice of trailer leasing by railroads. The record before us is almost completely devoid of evidence that these opportunities for discrimination have been misused. In spite of the variety and complexity of all-rail TOFC tariffs, they seem to be serving their purpose effectively, and we would not be justified in imposing a new scheme of publication in the absence of specific shipper complaints. The same appears to be true of trailer leasing. Where complaints of discrimination have been made, as in the case of certain midwestern meatpackers, the railroads involved have taken steps to correct the situation. We agree with the examiners that tariff rules providing for the publication of charges for leasing trailers and for other special TOFC services will eliminate many of the present opportunities for abuse. Should this approach prove ineffective, additional steps can be taken at some future time. At present, we conclude that they are not needed, and that regulations substantially similar to those recommended will suffice. The only significant change we think necessary in the recommended tariff rules is to provide for publication by rail carriers of

the leasing charges of affiliates. To omit the practices of rail-affiliated leasing companies from the effect of the leasing rule would obviously be to create a legal loophope and to allow the doing by indirection of what could not be done directly. The following rules will be adopted:

7 *Tariff publication regulations.*

(*a*) Each railroad performing or holding out to perform TOFC service shall publish, post, and file tariffs (itself or through an agent) which shall contain in clear and explicit terms all of the rates and charges for and the rules governing the leasing of equipment to any person using its TOFC service (whether by the railroad itself or by any person affiliated with or controlled by the railroad or any agents of the railroad), and other special services or practices, including charges for pickup or delivery service when such charges are in addition to line-haul transportation charges. Such tariffs shall also contain, in clear and explicit terms, all amounts to be paid to any shipper for the lease of any empty truck, trailer, or semitrailer (or the container portion of any truck, trailer, or semitrailer having a demountable chassis) when such empty equipment is being transported incidentally to its prior or subsequent use in TOFC service.

(*b*) No allowance shall be payable by a rail carrier to any shipper, freight forwarder, or consignee which renders any service or furnishes any instrumentality in connection with TOFC service unless (1) such service is one that the rail carrier is obligated to perform or provide under the applicable rate and (2) the amount of the allowance is published in tariffs on file with the Interstate Commerce Commission.

(*c*) The area within which pickup and delivery service will be performed by a rail carrier offering to pro-

vide TOFC service shall be described specifically and the description published in clear and explicit terms in the tariff. It is not permissible to refer to decisions of the Commission for the description nor to state that the area within which pickup and delivery service will be performed is that defined by the Commission in a formal proceeding.

(*d*) All rail tariffs containing rates for TOFC transportation of property shall specify the extent to which such rates do or do not include the loading and unloading of property from or to the highway vehicle by the carrier. When charges in addition to the line-haul TOFC transportation charges or in addition to pickup or delivery charges, if any, are made for the loading or unloading of property, they shall be published in appropriate tariffs and filed with the Interstate Commerce Commission.

(*e*) Highway vehicles or rail cars provided by shippers or freight forwarders in connection with all-rail TOFC service, while on railroad premises, shall be subject to the storage or demurrage rules, regulations, and charges published in tariffs on file with the Interstate Commerce Commission.

* * * *

APPENDIX

49 USC § 5b(6)

(6) The Commission shall not approve under this section any agreement which establishes a procedure for the determination of any matter through joint consideration unless it finds that under the agreement there is accorded to each party the free and unrestrained right to take independent action either before or after any determination arrived at through such procedure.

* * * *

49 USC § 41

SEC. 1. [*February 19, 1903 amended June 25, 1906.*] [*49 U.S.C. § 41 (1).*] That anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act, shall be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect

to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: *Provided*, That any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

SEC. [1] [*February 19, 1903, June 29, 1906.*] [*49 U.S.C. § 41(2).*] In construing and enforcing the provisions of

this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act.

SEC. [1] [*June 29, 1906.*] [*49 U.S.C. § 41(3).*] Any person, corporation, or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of this Act, or for whom as consignor or consignee, any such carrier shall transport property from one State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or foreign country, who shall knowingly by employee, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in this Act, shall in addition to any penalty provided by this Act, forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and the Attorney-General of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person, corpo-

ration, or company has knowingly received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as a foresaid, to institute in any court of the United States of competent jurisdiction, a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be.

APPENDIX

49 CFR § 1090.7(a)

§ 1090.7 Tariff publication regulations.

(a) Each railroad performing or holding out to perform TOFC service shall publish, post, and file tariffs (itself or through an agent) which shall contain in clear and explicit terms all of the rates and charges for and the rules governing the leasing of equipment to any person using its TOFC service (whether by the railroad itself or by any person affiliated with or controlled by the railroad or any agents of the railroad), and other special services or practices, including charges for pickup or delivery service when such charges are in addition to line-haul transportation charges. Such tariffs shall also contain, in clear and explicit terms, all amounts to be paid to any shipper for the lease of any empty truck, trailer, or semitrailer (or the container portion of any truck, trailer, or semitrailer having a demountable chassis) when such empty equipment is being transported incidentally to its prior or subsequent use in TOFC service.

Supreme Court, U. S.
FILED
NOV 7 1975

IN THE

Supreme Court of the United States

October Term, 1975
No. 75-529

FARLEY TERMINAL CO., INC.,

Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Response in Opposition to Petition for Writ of Certiorari.

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Response in Opposition to Petition for Writ of Certiorari.

Opinions Below.

The judgment of the United States Court of Appeals, entered July 9, 1975, not reported, appears in Appendix A hereto. The opinion of the United States Court of Appeals, entered July 9, 1975, not yet reported, appears in Appendix B hereto. The Judgment of the United States District Court for the Central District of California, granting The Atchison, Topeka and Santa Fe Motion for Summary Judgment, entered February 19, 1974, not reported, appears in Appendix C hereto. The United States District Court Findings of Fact and Conclusions of Law, not reported, appear in Appendix

D hereto. Those relevant pages of the Interstate Commerce Commission Decision in *Ex Parte 230,* Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service), 322 I.C.C. 301 (1964), dealing with trailer-rental contracts, specifically pages 303, 319, and 370-372, appear in Appendix E hereto.

Questions Presented.

Was it the intent of the Interstate Commerce Commission (hereinafter referred to as the *ICC*) that approved rate tariffs for leasing *TOFC* equipment in interstate commerce, filed pursuant to its *Ex Parte 230,* 322 I.C.C. page 301, supersede and render null and void TOFC Leasing Rates contained in existing carrier-shipper agreements?

What is the legal effect of The Atchison, Topeka and Santa Fe Railway Company being a party to Transcontinental Freight Bureau Tariff Supplement 41 to Freight Tariff 2-F, Item 4900-E, Section I filed pursuant to *Ex Parte 230?*

Statement of Case.

This case involves the rates to be charged for the leasing of trailers for use in piggyback or trailer-on-flatcar (TOFC) service as of November 17, 1967, the date that Transcontinental Freight Bureau Tariff, Supplement 41 to Freight Tariff 2-F, Item 4900-E, Section I, was filed by Santa Fe and the other railroads. Prior to that date, Santa Fe billed and charged Farley Terminal Co., Inc. (Farley) the rates contained in a lease agreement previously entered into by the parties.

In 1962, the Interstate Commerce Commission instituted a general investigation into trailer-on-flatcar

(TOFC) or piggyback service. The investigation was to cover "every aspect of TOFC operations. . . ." 322 I.C.C. 303.

On October 9, 1962, a pre-hearing conference formulated a series of proposed rules.

> "The proposed rules were predicated upon the basic premise that all persons desiring to use TOFC service should be able to do so, with the charges for the same services being equal to all users, whether they be motor or water carriers, freight forwarders, or private shippers." 322 I.C.C. at 319.

Other important aspects of the proposed rules included a requirement that a rail carrier providing all rail TOFC service make a specific provision in its tariffs for all incidental and accessorial services offered by it in connection therewith.

The Examiners recommended that railroads performing all rail TOFC services be required to publish in their tariffs all the rates, charges and rules connected with such service, including charges for the leasing of equipment, detention of trailers, accessorial services, and pickup and delivery service, if any such services are offered. The ICC stated in *Ex Parte 230* at page 370 that "unless the same opportunity to lease equipment is made available to all similarly situated shippers at the same price, the leasing of a trailer to a favored shipper can become a concession violative of the ELKINS ACT." *Ex Parte 230* was challenged by Santa Fe and others on grounds not relevant to this case and was reversed in *AT&SF R. Co. v. United States,* 244 F.Supp. 955 (1965) and was affirmed in *American Trucking Association v. AT&SF R. Co.,* 387 U.S. 847 (1967).

The Interstate Commerce Commission served an order dated July 13, 1967, on Santa Fe and other railroads requiring compliance with Rule 500.7 of *Ex Parte 230,* p. 415. Under the order, tariffs were required to be filed by August 18, 1967.

On August 2, 1967, the railroads filed a petition with the ICC to postpone the effective date of the order for a period of ninety (90) days beyond August 18, 1967, or until November 16, 1967.

The extension was granted and the result of the combined efforts of the various railroads involved was a formulation of the Interstate Commerce Commission approved Transcontinental Freight Bureau Tariff and filing thereof. The tariff was issued on October 12, 1967, and became effective on November 17, 1967. Santa Fe was a party to said multi-party tariff. The rates contained in said tariffs were consistent for all railroads furnishing the same services.

It was not until August 3, 1973, that Farley filed its complaint for breach of contract in the United States District Court for the Central District of California. In said complaint, Farley alleged only that Santa Fe commenced charging it at a higher rate in the tariff than the rate contained in the pre-existing leasing agreement. The complaint did not allege that the tariff rates were unreasonable. Also, it was not until August 3, 1973, that Farley first contested the tariff rates. Farley failed to file a protest with the Interstate Commerce Commission contesting said rates.

In its answer to Farley's complaint, Santa Fe contended that as a matter of law the rates contained in the tariff vitiated or negated the rates contained in the pre-existing leasing agreement.

The United States District Court granted Santa Fe's motion for summary judgment, dismissed Farley's complaint, and denied its motion for summary judgment, and entered judgment for Santa Fe. The findings of fact and conclusions of law of United States District Court for the Central District of California, entered February 19, 1974, are found in Appendix D. Farley appealed to the United States Court of Appeals for the Ninth Circuit which affirmed the decision rendered by the United States District Court in *Farley Terminal Co., Inc. v. The Atchison, Topeka and Santa Fe Railway Company,* No. 74-1872, July 9, 1975.

The substance of the Court of Appeals decision was that the filing of the ICC approved tariff by Santa Fe along with other railroads voided those rates covering the same subject matter in pre-existing contracts between the parties.

REASONS FOR NOT GRANTING THE WRIT.

I

The Decision Below Does Not Conflict With the Decision Rendered by This Court in Arizona Grocery Co. v. Atchison, Topeka and Santa Fe Ry. Co., 284 U.S. 370 (1932).

In the *Arizona Grocery* case, this Court held that where the ICC, upon complaint, holds a hearing on the reasonableness of a rate, and determines a reasonable rate, it cannot thereafter, at a subsequent hearing, declare the previously declared reasonable rate to be unreasonable and give the unreasonableness of the rate retroactive application.

Although it is true that the Court in the *Arizona Grocery* case distinguished between Commission made and carrier made rates, it concluded that the Interstate Commerce Commission and not the Courts, has the power to determine the reasonableness of such rates. It is only after a shipper protests carrier made rates within a statutory period of time that the ICC holds a hearing to determine the reasonableness of such rates. If the ICC determines the rates to be reasonable, it may prescribe or order specific rates the carriers may charge.

In this case, Farley never filed a protest with the ICC as to the reasonableness of the rates charged it under the tariff.

It never contested the reasonableness of the tariff rates in its complaint on file with the United States District Court.

And further, it never brought the reasonableness of the tariff rates into issue at the United States District Court hearings below. Below it claimed only that the

tariff rates were in excess of the lease agreement rates. It is now raising the issue for the first time.

Still further, the issue of whether a tariff was a unilateral tariff was never discussed in the *Arizona Grocery* case.

II

The Holding Below Does Not Conflict With the Decision of Another Court of Appeals.

Farley cites the United States Court of Appeals, Eighth Circuit, case of *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212 (Eighth Circuit 1970), cert. denied 402 U.S. 999 (1971), for the erroneous proposition that Santa Fe is not entitled to keep the difference between the pre-existing contract rates with Farley and the tariff rates.

First, the *Middlewest Motor Freight Bureau* case on the facts is distinguishable, and the case further does not make such a statement.

In the *Middlewest Motor* case carriers filed a tariff containing a higher rate than a previously published rate. Various shippers contested that higher rate by filing a protest before the Interstate Commerce Commission, the body that Congress gave jurisdiction to determine rates. Although that case did have language indicating that the burden is on the carrier to show that its rates are just and reasonable, and to justify any change in rates, the shippers first had to avail themselves of their administrative remedy, *i.e.:* of filing a protest before the Interstate Commerce Commission. In the *Middlewest* case, therefore, the various shippers did file protests with the Interstate Commerce Commission over the new tariff rates. In the case here, Farley filed no such protest, and never challenged the

rates before the Interstate Commerce Commission, the body ordained by Congress to have exclusive powers for determining rates involving interstate commerce transactions.

Also, it should be noted that in the *Middlewest* case, *supra,* the I.C.C. after a hearing, found the tariff rates were not just and reasonable and ordered them cancelled.

In this matter, Farley never contested the reasonableness of the rates, and there never was a hearing held before the Interstate Commerce Commission in regard to same.

Further, the Court in the *Middlewest* case, *supra,* at page 222, in discussing whether tariff rates are unreasonably high or discriminating, states "such a judgment lies solely within the province of the Interstate Commerce Commission." The Court, in substance, held in the aforecited case that the tariff in question was unlawful because carriers maintained the tariff in violation of an order of the Interstate Commerce Commission.

III

Santa Fe Did Not Unilaterally Circumvent a Systemwide Contract Rate.

Santa Fe, along with numerous other rail carriers, became a party to Transcontinental Freight Bureau Tariff, Supplement 41 to Freight Tariff 2-F, Item 4900, Section I, covering rates involving leasing of TOFC equipment in interstate commerce. A mutually acceptable rate was determined by all carriers involved. The rate was approved by the ICC and the tariff became effective upon its filing on November 17, 1967. Farley, as well as other shippers and shippers' agents, had actual notice of the new rate found in the tariff, but

did not choose to protest it or challenge it before the ICC, the body having jurisdiction of said rate. The new rate was not a unilateral rate, but rather a multi-party rate. Case law cited by Santa Fe and relied upon partially by the United States Court of Appeals clearly shows that upon the effective date of the tariff, the rates of the pre-existing lease agreement were vitiated and void.

IV

Santa Fe Had No Duty to Publish Its Own Tariff Containing Rates Consistent With Existing Contracts.

It is unchallenged that Santa Fe was not the only party to the Transcontinental Freight Bureau rate, but many other railway companies were likewise parties. If Santa Fe had filed a tariff rate at the existing rate of the lease agreement, it would have been left with a rate different than those of other railroads with the same service. This would clearly constitute a violation of *The Elkins Act,* 49 U.S.C., Section 41, and likewise would have circumvented the public policy intended by Congress to preclude discrimination of rates in interstate commerce.

The Interstate Commerce Commission intended that tariffs required by it to be filed, pursuant to its *Ex Parte 230,* page 301, would apply to existing contracts. It was not necessary for the ICC to effectuate this intent by including express language in the order that existing contracts are abrogated upon effectiveness of the tariff. A vast and convincing body of Federal law relevant to regulation of interstate commerce, clearly states such a specific intent.

Pursuant to the requirement levied by *Ex Parte 230,* page 301, the railroads drafted a rate tariff covering

the leasing of TOFC equipment. That tariff, after approval by the ICC, was filed and had the force and effect of statute. To continue charging Farley the lease rates would have resulted in rate discrimination and violation of *The Elkins Act,* 49 U.S.C., Section 41.

The specific tariff filed was in no way a unilateral tariff formulated by Santa Fe. The filing of the tariff could in no way be construed to be a breach of contract by Santa Fe. Farley was presumed to know that the rates of the lease agreement would be negated upon its replacement by an ICC approved tariff. When Farley entered into the lease contract with Santa Fe, it had knowledge that the contract could be changed at any time by newly created rates, orders or statements of the ICC in fulfilling its obligation to regulate interstate commerce.

The following cases support the position of Santa Fe:

Louisville & Nashville Railroad Company v. Mottley, 219 U.S. 467, 477-486 (1911);

Armour Packing Co. v. United States, 209 U.S. 56, 81-83 (1908);

New Haven Railroad Company v. I.C.C., 200 U.S. 361;

Texas and Pacific Railroad Company v. Mugg, 202 U.S. 242, 245 (1906);

New Haven Railroad Company, supra, 200 U.S. at 393;

Lowden v. Simonds-Shields-Lawnsdale Grain Co., 306 U.S. 516, 520 (1939).

Farley has failed to show inconsistent United States Court of Appeals decisions on point. He has failed

to show any significant questions of Federal law that this court should decide. The possibility of antitrust law violations was never in issue in the courts below.

Conclusion.

For the above reasons, the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

Respectfully submitted,

MATTHEW H. WITTEMAN,
DAVID E. PARRY,
By MATTHEW H. WITTEMAN,
Attorneys for The Atchison, Topeka and Santa Fe Railway Company.

APPENDIX A.

Judgment of the U.S. Court of Appeals for the Ninth Circuit, in Farley Terminal Company, Inc. v. Atchison, Topeka & Santa Fe Railway Co., No. 74-1872, entered July 9, 1975.

United States Court of Appeals, for the Ninth Circuit.

Farley Terminal Company, Inc., *Plaintiff-Appellant,* vs. Atchison, Topeka & Santa Fe Railway Company, *Defendant-Appellee.* No. 74-1872, DC #73-1818.

Harold Willinger as Assembly Con., *Plaintiff-Appellant,* vs. Atchison, Topeka & Santa Fe Railway Company, *Defendant-Appellee.* No. 74-2410, DC #73-1806.

APPEAL from the United States District Court for the Central District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is AFFIRMED.

74-1872

With costs in this court in favor of the Appellee and against the Appellant in the amount of $326.84

Cost of printing Appellee's brief $326.84

Filed and entered July 9, 1975.

APPENDIX B.

Opinion of the U.S. Court of Appeals for the Ninth Circuit, in Farley Terminal Company, Inc. v. The Atchison, Topeka and Santa Fe Railway Company, No. 74-1872, entered July 9, 1975.

United States Court of Appeals, for the Ninth Circuit.

Farley Terminal Company, Inc., *Plaintiff-Appellant,* vs. The Atchison, Topeka and Santa Fe Railway Company, *Defendant-Appellee.* No. 74-1872.

Harold Willinger, doing business as Assembly Consolidators, *Plaintiff-Appellant,* vs. The Atchison, Topeka and Santa Fe Railway Company, *Defendant-Appellee.* No. 74-2410.

OPINION

[July 9, 1975]

Appeal from the United States District Court for the Central District of California.

Before: KOELSCH and GOODWIN, Circuit Judges, and WOLLENBERG,* District Judge.

PER CURIAM:

In these separate but related actions for damages for breach of contract, Farley Terminal Co., Inc., and Harold Willinger, lessees of TOFC (trailer-on-flatcar) or "piggy-back" service equipment under separate but substantially identical lease agreements with the Atchi-

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*The Honorable Albert C. Wollenberg, United States District Judge for the Northern District of California, sitting by designation.

son, Topeka and Santa Fe Railway Company (the Santa Fe), appeal from the district court's granting of summary judgments in favor of the lessor railway. The question presented is whether the Santa Fe's filing of a rate tariff as required by the Interstate Commerce Commission (ICC)—which tariff, when approved, imposed on lessees higher rates for the leasing of TOFC equipment than were provided in the pre-existing lease agreements—constitutes an actionable breach of those agreements. We conclude it does not and therefore affirm.

Briefly, the facts are these: In its decision in *Ex parte 230, Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders* (*Piggyback Service*), 322 I.C.C. 301 (1964), the ICC promulgated regulations requiring that each railroad providing TOFC service in interstate commerce publish, post, and file tariffs containing all rates and charges for the leasing of its TOFC equipment. *See* 322 I.C.C. at 415; 49 C.F.R. § 500.7 (1964), redesignated 49 C.F.R. § 1090.7 (1967).[1] Early in 1967, Farley and Willinger executed separate lease agreements with the Santa Fe whereby each agreed to lease trailers and flatcars from the railway on an availability basis, at rates specified in the agreements. During the following months, each was charged at those rates. However, in July, 1967, the ICC served an order on the Santa Fe and other railroads which provided TOFC service, requiring them to comply with the regulations promulgated in *Ex parte 230* by

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[1]A challenge to *Ex parte 230,* on grounds not relevant to this appeal, was sustained in *A., T. & S. F. R. Co. v. United States,* 244 F. Supp. 955 (N.D. Ill. 1965) (three-judge court), and then *reversed sub nom. American Trucking Associations, Inc. v. A., T. & S. F. R. Co.,* 387 U.S. 397 (1967).

filing appropriate tariffs before August 18, 1967. After obtaining a ninety-day extension, the railroads, including the Santa Fe, filed Trans-Continental Freight Bureau Freight Tariff 2-F, Supplement 41, Section 1, Item 4900-E. This tariff, which established higher rates for the leasing of TOFC equipment than were provided in the pre-existing leases, became effective November 17, 1967, after the ICC approved it. Lessees were thereafter charged at the new, higher rates. They brought these actions to recover the difference between the charges they paid under the tariff and those they would have paid under their respective agreements. The district court granted summary judgments in favor of the Santa Fe, and these appeals followed.

We commence with the fundamental principle that summary judgment is proper only where there is no genuine issue as to any material fact or where, viewing the evidence and the inferences which may be drawn therefrom in the light most favorable to the adverse party, the movant is entitled to prevail as a matter of law. Rule 56, F. R. Civ. P. Here the district court properly granted summary judgments in favor of the railroad.

Appellants concede, as they must, that once the new tariff rates for TOFC service became effective, the Santa Fe was bound by law to charge those rates. Section 6(7) of the Interstate Commerce Act, 49 U.S.C. § 6(7), prohibits carriers in interstate commerce from receiving "different compensation . . . than the rates, fares, and charges which are specified in the tariff filed and in effect at the time." Moreover, the Elkins Act, 490 U.S.C. §§ 41 *et seq.* provides criminal penalties for departures from the published rates, *see* 49 U.S.C. § 41(2), and for a carrier's

returning to a shipper rebates or offsets against them, *see* 49 U.S.C. §41(3).

Appellants nevertheless urge their entitlement to damages based on the variance between the tariff rates they were charged and those specified in their pre-existing agreements with the railway. We are not persuaded. It is well recognized that the principal congressional purpose in enacting the Interstate Commerce Act was to obtain a uniformity of rates and an end to discriminatory practices. As the Court early noted in *New Haven Railroad Company v. I.C.C.*, 200 U.S. 361, 391 (1906):

> "It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve."

Where, as here, a conflict exists between published tariff rates and rates enumerated in pre-existing agreements, we think it well established that the tariff rates must prevail. Were we to permit enforcement of the inconsistent contractual rates, we would significantly undercut the clear policy of the Act to secure equal rates for all, as well as condone one discriminatory situation such as the Act was intended to remedy. *See, e.g., Louisville and Nashville Railroad Company v. Mot-*

tley, 219 U.S. 467, 477-486 (1911); *Armour Packing Company v. United States,* 209 U.S. 56, 81-83 (1908); *Texas and Pacific Railway Company v. Mugg,* 202 U.S. 242, 245 (1906); *New Haven Railroad Company, supra,* 200 U.S. at 390-392.[2] *Cf. American Trucking*

[2]For example, the Court observed in *Armour Packing Company, supra,* 209 U.S. at 81-82, as follows:

> "It [the law regulating interstate commerce] has provided for the establishing of one rate, to be filed as provided, subject to change as provided, and that rate to be while in force the only legal rate. Any other construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish.
>
> ". . . This feature of the law, it is insisted, puts the shipper in many kinds of trade at the mercy of the carrier, who may arbitrarily change a rate, upon the faith of which contracts have been entered into. But the right to make such regulations is inherent in the power of Congress to legislate respecting commerce, and such consideration of inconvenience or hardship address themselves to the law-making branch of the Government. . . .
>
> "The statute being within the constitutional power of Congress, and being in force when the contract was made, is read into the contract and becomes a part of it.
>
> "If the shipper sees fit to make a contract covering a definite period for a rate in force at the time he must be taken to have done so subject to the possible change of the published rate in the manner fixed by statute, to which he must conform or suffer the penalty fixed by law."

The Court further said in *Mottley, supra,* 219 U.S. at 482-483:

> "The agreement between the railroad company and the [plaintiffs] must necessarily be regarded as having been made subject to the possibility that, at some future time, Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable or impair its value. That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations, is inconceivable. The framers of the Constitution never intended any such state of things to exist.
>
> ". . . After the commerce act came into effect no contract that was inconsistent with the regulations established by the act of Congress could be enforced in any court. The rule upon this subject is thoroughly established."

Association, Inc. v. A., T. & S. F. R. Co., 387 U.S. 397, 406 (1967).

In this connection, a tariff, rate, or charge, duly established in accordance with the Act, is the legal rate; it has the force of statute and is binding on carrier and shipper alike. *See Lowden v. Simonds-Shields-Lonsdale Grain Co.,* 306 U.S. 516, 520 (1939); *Pennsylvania Railroad Company v. International Coal Mining Company,* 230 U.S. 184, 196-197 (1913); *Robinson v. Baltimore and Ohio Railroad Company,* 222 U.S. 506, 508-510 (1912).[3] And a contract valid when made is nevertheless rendered void by subsequently established tariff rates which are inconsistent, at least to the extent of the inconsistency. *See Mottley, supra,* 219 U.S. at 480-486.[4] Moreover, a shipper's

[3]Appellants rely heavily on *Macco Construction Company v. Farr,* 137 F.2d 52 (9th Cir. 1943), and *Ets-Hokin & Galvan, Inc. v. Maas Transport, Inc.,* 380 F.2d 258 (8th Cir. 1967), *cert. denied,* 389 U.S. 977 (1967). We think both decisions are inapposite. In *Macco,* we held that a contract which incidentally violated a California licensing statute was not thereby rendered unenforceable because the California legislature did not intend that such violations void otherwise legal contracts. 137 F.2d at 55. And in *Ets-Hokin,* which relied in part on *Macco,* the Eighth Circuit held that a contract which violated the Motor Carrier provisions of the Interstate Commerce Act was not unenforceable because Congress, in passing those provisions, did not intend "that contracts resulting in violations of that portion of the Act be illegal and void." 380 F.2d at 260-261. Here, however, as noted in the cited cases, Congress did intend to render void rates inconsistent with those established in conformity with the Act.

[4]Appellants cite *Chicago, Milwaukee, St. Paul & Pacific Railroad Company v. Alouette Peat Products,* 253 F.2d 449 (9th Cir. 1957), for the proposition that, even though shippers are required to pay carriers the rate on file with the ICC, a showing that such a rate was not lawfully established would entitle them to recover the difference between what they had thus paid and the lawfully established rate. Here, however, appellants have presented no showing that the published rate was unreasonable or otherwise established in violation

(This footnote is continued on next page)

knowledge of duly published tariff provisions is presumed. *American Railway Express Company v. Daniel,* 269 U.S. 40, 42 (1925); *Kansas City Southern Railway Company v. Carl,* 227 U.S. 639, 653 (1913); *Chicago & Alton Railroad Company v. Kirby,* 225 U.S. 155, 166 (1912); *Mugg, supra,* 202 U.S. at 245.[5]

Appellants' remaining contention—that the Santa Fe was required under the circumstances to establish a tariff rate identical to that enumerated in its pre-existing agreement with appellants—is without merit. It is well settled that a carrier is entitled to initiate rates, and to adopt such policy of rate-making as it deems wise, subject to the revisory powers conferred upon the ICC. *See Diamond Tank Transport v. United States,* 23 F. Supp. 497, 501 (W.D. Wash., N.D. 1938) (three-judge court), *affirmed,* 305 U.S. 567 (1938); *United States v. Illinois Central Railroad Company,* 263 U.S. 515, 522 (1924). And in light of the congressional intention, already noted, that pre-existing agreements be abrogated by subsequently promulgated regulations, at least to the extent of the inconsistency, we think it clear that a carrier's decision fixing a proposed tariff rate to be charged uniformly to all should not be foreclosed by its pre-existing obligation to charge a different rate to a few.

AFFIRMED.

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of the Act. The mere fact that the published rate is inconsistent with a rate enumerated in pre-existing contracts does not render it violative of the Act.

[5] *Southern Pacific Company v. Miller Abattoir Company,* 454 F.2d 357 (3d Cir. 1972), relied on by appellants, is not to the contrary. That decision merely held that a provision in a shipping contract, requiring that the railroad immediately notify the consignee if a cargo of livestock were stopped in transit by quarantine, was not satisfied by the railroad's publication of a tariff explicitly stating that screw worms existed in Arizona and that livestock leaving that state would be stopped for inspection. *See* 454 F.2d at 361-362.

APPENDIX C.

Judgment of the United States District Court for the Central District of California, entered February 19, 1974.

In the United States District Court, for the Central District of California.

Farley Terminal Co., Inc., *Plaintiff,* vs. The Atchison, Topeka and Santa Fe Railway Company, *Defendant.* Civil Action No. 73-1818-EC.

JUDGMENT

This action came on for hearing before the Court, Avery E. Crary, District Judge, presiding, and the issues having been duly heard and a decision having been duly ordered,

IT IS ORDERED AND ADJUDGED, that the plaintiff take nothing and that the action be dismissed on the merits.

DATED at Los Angeles, California, this 19th day of February, 1974.

/s/ E. Avery Crary
United States District Judge

APPENDIX D.

Findings of Fact and Conclusions of Law of the United States District Court for the Central District of California, entered February 19, 1974.

In the United States District Court, for the Central District of California.

Farley Terminal Co., Inc., *Plaintiff*, vs. The Atchison, Topeka and Santa Fe Railway Company, *Defendant*. Civil Action No. 73-1818-EC.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court, having duly heard defendant's Motion for Summary Judgment on February 11, 1974, does hereby make the following findings of facts and conclusions of law:

That on February 20, 1967, plaintiff and defendant executed a Lease Agreement, wherein defendant would lease to plaintiff, on an availability basis, TOFC equipment (flat cars and trailers) at rates specified in the terms of the aforementioned Lease Agreement;

That prior to November 17, 1967, defendant charged plaintiff for lease and use of such equipment pursuant to the aforementioned Lease Agreement;

That subsequent to November 17, 1967, Trans-Continental Freight Bureau Tariff Supplement 41 to Freight Tariff 2F, Item 4900, Section I, was approved by the Interstate Commerce Commission and filed and became effective;

That the aforementioned tariff had the force and effect of law and was the proper tariff for defendant to charge plaintiff for plaintiff's use of defendant's TOFC equipment in Interstate Commerce;

That the rates provided in said tariff, as a matter of law, rendered null and void the rates contained in the Lease Agreement, dated February 20, 1967; [although Ex Parte 230 did not express an intent to negative existing rate contracts]

That, therefore, as a matter of law, the proper rates for defendant to charge plaintiff for its use of defendant's TOFC equipment for eastbound movements in Interstate Commerce, were the rates contained in the aforedescribed tariff.

It is ordered, therefore, that defendant's Motion for Summary Judgment be and the same hereby is granted and that said Judgment be entered herein in the defendant's favor, dismissing this action with costs to be taxed by the Clerk in favor of the defendant and against the plaintiff.

DATED: Feb. 19, 1974

/s/ E. Avery Crary
United States District Judge

APPENDIX E.

SUBSTITUTED SERVICE—PIGGYBACK

John E. Faulk, R. M. Hartsock, and *Clement T. Mayo* for Department of Defense.

William R. Pierce for General Services Administration.

John H. Fallon, Harvey Gobetz, and *Asa J. Merrill* for Bureau of Inquiry and Compliance, Interstate Commerce Commission.

Report of the Commission on Oral Argument

By the Commission:

This proceeding, instituted on June 29, 1962, on our own motion under the authority of parts I, II, III, and IV of the Interstate Commerce Act and section 4 of the Administrative Procedure Act, constitutes this Commission's first general investigation of what is probably the most significant recent development in transportation—trailer-on-flatcar or piggyback service. The notice of proposed rulemaking made it known that we intended this investigation to be broad in scope, encompassing every aspect of TOFC operations, and that we intended to explore new approaches to piggyback service. Among the matters specifically mentioned in the notice as a subject for consideration was:

> The extent to which motor carriers, water carriers, express companies and freight forwarders should be permitted to use Plans III and IV [open-tariff] rail rates and service in their operations.

It was also made clear that we intended to reexamine existing precedents and practices, and that consideration

would be given to the adoption of rules and regulations which might be found necessary to regulate coordinated and substituted service transportation in the public interest.

The order instituting this proceeding named as respondents all railroads, motor carriers, and water carriers of property, freight forwarders, and express companies operating in interstate commerce, and authorized and directed our Bureau of Inquiry and Compliance to participate. It also assigned the matter for a prehearing conference, which was held October 9, 1962, and at which proposed rules, reproduced as appendix II hereto, were distributed. Oral hearings have not been held, but representations, verified statements, and reply statements have been received from numerous interested parties. The proceeding was assigned to two hearing examiners who recommended adoption of the regulations contained in appendix III hereto. Exceptions to the .....

A similar, perplexing problem for shippers and carriers has been interpretation of the "mixture" tariff rule applicable to plan III transportation of "all-commodity" traffic. Ordinarily this type of rule will provide that not more than 60 percent of the weight of a total, two-trailer shipment may consist of any one commodity or article. One frequent variation of this tariff rule provides the alternative test; not more than 60 percent of the total shipment or not more than 60 percent of 70,000 pounds. The carriers do not seem to be applying any consistent approach in determining whether commodities being shipped are the "same" commodity or article. In general, neither commodity classifications nor other published listings are used to determine whether the articles included in a single

shipment are sufficiently dissimilar to constitute different commodities for the purposes of mixture rules. This state of affairs leaves a railroad free to haul straight truckloads of high-rated commodities at hidden bargain rates should it choose to do so for a favored shipper.

Bearing in mind the historical development of piggyback transportation and its present-day problems—as well as its appealing advantages—we shall now proceed to an examination of the issues raised directly by the instant investigation.

The Proposed Rules

At the prehearing conference held in this proceeding on October 9, 1962, a series of proposed rules, reproduced as appendix II hereto, was distributed. As noted at that time, they were designed to serve as a framework upon which rules ultimately to be adopted, if any, could be developed. The proposed rules represented something of a new approach to TOFC terminology as they attempted to separate TOFC service, without regard to the five numbered plans now in common use, into two more basic classes: "joint intermodal" TOFC service which would include any piggyback service performed jointly by a rail carrier and a motor or water common carrier; and "all-rail" TOFC service which would include any piggyback service in which traffic moves exclusively at rail rates and on rail billing.

The proposed rules were predicated upon the basic premise that all persons desiring to use TOFC service should be able to do so, with the charges for the same services being equal to all users, whether they be motor or water carriers, freight forwarders, or private shippers. The proposed rules B-4, B-5, C-1, and C-2 in .....

It is apparent that this state of affairs places a premium on a shipper's having a sophisticated traffic department, capable of assessing the various available services, charges, and allowances, and of determining what combination offers the best transportation bargain in moving a particular shipment. We think that carriers should be encouraged to use as simple a method of tariff publication as possible, and should be discouraged from permitting the kind of situation illustrated. It is also clear that the general practice by which railroads and their affiliates trip lease trailers to shippers for immediate use in TOFC service contains potential seeds of discrimination. Unless the same opportunity to lease equipment is made available to all similarly situated shippers at the same price, the leasing of a trailer to a favored shipper can become a concession violative of the Elkins Act.

While we recognize that there are opportunities for discrimination in present rate publication and equipment leasing practices, we cannot agree with the A.T.A. that the only available cures are a straitjacket for TOFC tariffs and major surgery to excise trailer leasing. The contentions that rail carriers are required by statute to publish rates only for a "complete" service and that they are obligated to furnish trailers wherever TOFC service is provided were disposed of in *Eastern Central M. Carriers Assn. v. Baltimore & O. R. Co.*, 314 I.C.C. 5, 45-47, *aff'd. sub nom. Cooper-Jarrett, Inc., v. United States,*..... F. Supp. .... (W.D. Mo. 1964) (civil action No. 13469, February 6, 1964). The basic flaw in the A.T.A's legal argument, which was also pointed out in that decision, appears to be the false assumption that a highway trailer necessarily is an "instrumentality of transportation" which carriers must

furnish. This can, of course, be the case when a railroad holds out a service which by its nature requires performance of some motor carriage. But it need not hold out to perform more than rail service, and in that case the trailer, tendered for transportation by a shipper, is nothing more than a container—an "article of commerce."

We must point out here that we are not holding that the service which a carrier holds out to perform can only be ascertained from the actual words of its tariff. When a rail carrier offers a ramp-to-ramp TOFC service, ostensibly confined to the line-haul rail transportation of loaded highway trailers tendered at its terminal by shippers, but then proceeds to lease trailers, and to provide drayage, loading, and other "accessorial" services, we think that it is *in fact* holding out a complete door-to-door service. In such a case, all the services it provides become *transportation* services rather than mere accessorial services, and they are required to be the subject of its tariff publications. This, we think, disposes of the New York Central's argument that we have no authority to require the publication of accessorial services. To agree with the Central's position would be to allow any carrier, by self-imposed limitations contained in its tariffs, to designate what it considers to be transportation services and what it considers nontransportation services. This distinction is, we believe, a matter of fact and not one that can be imposed by fiat. The nature of piggyback—the fact that its advantage lies in its being a combination of rail and motor transportation—makes rail carriers tend to offer to their customers services which were traditionally provided only by motor carriers and which can physically be performed only with motor vehicles.

Such services, we believe, will normally be transportation services when offered in connection with TOFC transportation.

The existence of opportunities to engage in discriminatory practices, standing alone, will not, in our opinion, justify our requiring a strict format for TOFC rate publications or striking down the prevalent practice of trailer leasing by railroads. The record before us is almost completely devoid of evidence that these opportunities for discrimination have been misused. In spite of the variety and complexity of all-rail TOFC tariffs, they seem to be serving their purpose effectively, and we would not be justified in imposing a new scheme of publication in the absence of specific shipper complaints. The same appears to be true of trailer leasing. Where complaints of discrimination have been made, as in the case of certain midwestern meat-packers, the railroads involved have taken steps to correct the situation. We agree with the examiners that tariff rules providing for the publication of charges for leasing trailers and for other special TOFC services will eliminate many of the present opportunities for abuse. Should this approach prove ineffective, additional steps can be taken at some future time. At present, we conclude that they are not needed, and that regulations substantially similar to those recommended will suffice. The only significant change we think necessary in the recommended tariff rules is to provide for publication by rail carriers of the leasing charges of affiliates. To omit the practices of rail-affiliated leasing companies from the effect of the leasing rule would obviously be to create a legal loophole and to allow the doing by indirection of what could not be done directly. The following rules will be adopted:

7 *Tariff publication regulations.*

(*a*) Each railroad performing or holding out to perform TOFC service shall publish, post, and file tariffs (itself or through an agent) which shall contain in clear and explicit terms all of the rates and charges for and the rules governing the leasing of equipment to any person using its TOFC service (whether by the railroad itself or by any person affiliated with or controlled by the railroad or any agents of the railroad), and other special services or practices, including charges for pickup or delivery service when such charges are in addition to line-haul transportation charges. Such tariffs shall also contain, in clear and explicit terms, all amounts to be paid to any shipper for the lease of any empty truck, trailer, or semitrailer (or the container portion of any truck, trailer, or semitrailer having a demountable chassis) when such empty equipment is being transported incidentally to its prior or subsequent use in TOFC service.

(*b*) No allowance shall be payable by a rail carrier to any shipper, freight forwarder, or consignee which renders any service or furnishes any instrumentality in connection with TOFC service unless (1) such service is one that the rail carrier is obligated to perform or provide under the applicable rate and (2) the amount of the allowance is published in tariffs on file with the Interstate Commerce Commission.

(*c*) The area within which pickup and delivery service will be performed by a rail carrier offering to provide TOFC service shall be described specifically and the description published in clear and explicit terms in the tariff. It is not permissible to refer to decisions of the Commission for the description nor to state

that the area within which pickup and delivery service will be performed is that defined by the Commission in a formal proceeding.

(*d*) All rail tariffs containing rates for TOFC transportation of property shall specify the extent to which such rates do or do not include the loading and unloading of property from or to the highway vehicle by the carrier. When charges in addition to the line-haul TOFC transportation charges or in addition to pickup or delivery charges, if any, are made for the loading or unloading of property, they shall be published in appropriate tariffs and filed with the Interstate Commerce Commission.

(*e*) Highway vehicles or rail cars provided by shippers or freight forwarders in connection with all-rail TOFC service, while on railroad premises, shall be subject to the storage or demurrage rules, regulations, and charges published in tariffs on file with the Interstate Commerce Commission.

Billing and Notification Rules

Section D of the proposed rules and the examiners' recommended rules 19 through 23 deal with the billing of TOFC shipments and .....